

1 ROBERT P. VARIAN (STATE BAR NO. 107459)
2 DAVID KEENAN (WA Bar No. 41359 (*pro hac vice*))
3 CHRISTINE M. SMITH (STATE BAR NO. 267929)
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
5 The Orrick Building
6 405 Howard Street
7 San Francisco, California 94105-2669
8 Telephone: (415) 773-5700
9 Facsimile: (415) 773-5759
10 Email: rvarian@orrick.com

11 Attorneys for Plaintiffs
12 [Additional Counsel appear on signature page]

13 UNITED STATES DISTRICT COURT
14
15 NORTHERN DISTRICT OF CALIFORNIA
16
17 SAN FRANCISCO DIVISION
18

19 AUDLEY BARRINGTON LYON, JR., et. al.,

20 Plaintiffs,

21 v.

22 UNITED STATES IMMIGRATION AND
23 CUSTOMS ENFORCEMENT, et al.,

24 Defendants.

Case No.: 13-cv-05878 EMC

**JOINT CASE MANAGEMENT
STATEMENT**

Date: February 12, 2015
Time: 10:30 a.m., Courtroom 5
Judge: Hon. Edward M. Chen

1 The parties to this action, Plaintiffs Audley Barrington Lyon, Jr., José Elizandro Astorga-
2 Cervantes, Lourdes Hernandez-Trujillo, and the certified class they represent (collectively
3 “Plaintiffs”), by and through their attorneys of record, and Defendants United States Immigration
4 and Customs Enforcement (“ICE”); Sarah Saldaña, Director, ICE¹; United States Department of
5 Homeland Security (“DHS”); Jeh Johnson, Secretary of DHS; and Timothy Aitken, Field Office
6 Director for the ICE Enforcement and Removal Operations (“ERO”) Field Office in San
7 Francisco (collectively “Defendants”), by and through their attorneys of record, have met and
8 conferred as required by Federal Rules of Civil Procedure Rule 26(f), and based thereon, jointly
9 submit this report in compliance with this Court’s Standing Order for All Judges of the Northern
10 District of California.

11 **I. JURISDICTION**

12 This Court has subject-matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal
13 question), 28 U.S.C. §§ 2201 and 2202 (declaratory relief), and 5 U.S.C. § 706 (waiver of
14 sovereign immunity). Plaintiffs allege that venue is proper in the Northern District of California
15 under 28 U.S.C. §§ 1391(b) and (e) because a substantial part of the events and omissions giving
16 rise to Plaintiffs’ claims occurred, and continues to occur, in this District. Defendants deny that
17 venue is proper in the Northern District of California for members of the class detained in the Rio
18 Cosumnes Correctional Facility in Sacramento County, California (the “Elk Grove Facility”); the
19 Elk Grove Facility is located in the Eastern District of California. All parties have been served.

20 **II. BACKGROUND FACTS**

21 At the time the lawsuit was filed, the individual Plaintiffs were immigrants held in ICE
22 custody in connection with proceedings seeking to remove them from the United States. Plaintiff
23 Lyon remains in ICE custody at the West County Detention Center in the city of Richmond,
24 Contra Costa County, California (the “Richmond Facility”). Plaintiff Astorga-Cervantes was
25 previously held in ICE custody at the Elk Grove Facility in the Eastern District of California
26

27 ¹ Sarah Saldaña, Director, ICE, is substituted under Fed. R. Civ. P. 25(d) for former Acting
28 Director, John Sandweg, who was named as a defendant in this action in his official capacity but
resigned from this position effective February 21, 2014.

1 pending his removal proceedings; Astorga-Cervantes posted bond and was released from
2 immigration detention on February 20, 2014. Plaintiff Hernandez-Trujillo was previously
3 detained at both the Sacramento Main Jail (which was the predecessor facility used by
4 Sacramento County to house ICE detainees) and the Yuba County Jail (the “Yuba Facility”) prior
5 to being released on an order of supervision on April 4, 2014.² ICE does not itself operate any of
6 the three facilities at issue in this litigation, but contracts with the facilities for immigration
7 detention space. ICE has entered into separate Intergovernmental Service Agreements (“IGSA”)
8 with the Sacramento County and the Yuba County to house immigration detainees. ICE is
9 recognized as an authorized user to the Intergovernmental Agreement (“IGA”) between the U.S.
10 Marshall’s Service and the Contra Costa County.

11 On December 19, 2013, Plaintiffs filed a class action complaint for declaratory and
12 injunctive relief based on alleged violations of constitutional and federal statutory rights,
13 including rights to be represented by and consult with counsel, gather and present evidence,
14 obtain due process and a fair hearing in their removal proceedings and petition government
15 agencies for information and redress of grievances pursuant to the First Amendment. *See* ECF
16 No. 1. On February 21, 2014, Defendants answered the Complaint, denying Plaintiffs’
17 allegations of wrongdoing, challenging venue for all claims asserted by class members detained
18 in the Eastern District of California, and challenging Plaintiffs’ ability to satisfy the prerequisites
19 of Federal Rule of Civil Procedure 23 to maintain their class action. *See* ECF No. 24. The key
20 factual issues in dispute center on whether Defendants’ practices and policies related to telephone
21 access at the detention facilities in which Plaintiffs are or were held violate Plaintiffs’
22 constitutional and statutory rights in connection with proceedings to remove them from the
23 United States, and Defendants’ asserted bases and justifications for those policies and practices.

24 Following oral argument on Plaintiffs’ motion for class certification on April 10, 2014, the
25

26 ² Defendants served initial discovery requests on Plaintiffs, including Plaintiff Cornelio, on
27 October 23, 2014. Plaintiff Cornelio has neither responded to those discovery requests nor sought
28 an extension of time in which to respond. Plaintiffs’ counsel has been unable to communicate
with Plaintiff Cornelio. Accordingly, on February 4, 2015, Plaintiffs filed a Joint Stipulation of
Voluntary Dismissal of Plaintiff Cornelio. *See* ECF Nos. 70-71.

1 Court certified the class as proposed by Plaintiffs on April 16, 2014. *See* ECF Nos. 30 & 31. The
2 Court held an initial case management conference on July 10, 2014, and issued a Case
3 Management and Pretrial Order for Bench Trial the following day. *See* ECF Nos. 46-47.
4 Plaintiffs served their initial discovery requests on July 11, 2014. The parties agreed to stay
5 discovery from August 15, 2014 to October 9, 2014, to allow the parties to focus exclusively on
6 settlement discussions, but otherwise continue to actively exchange information through the
7 formal discovery process.

8 **III. LEGAL ISSUES**

9 The primary legal issues in this case are whether Defendants' policies and practices
10 relating to telephone access at the facilities in which Plaintiffs are or were held in ICE custody
11 violate Plaintiffs' rights to retain and consult counsel, to gather and present evidence, to petition
12 the government for redress of grievances pursuant to the First Amendment's Petition Clause and
13 to obtain a fair hearing under the Fifth Amendment Due Process Clause and 8 U.S.C. §§ 1362,
14 1229a(b)(4)(A) and 1229a(b)(4)(B). Plaintiffs contend the analysis will require the interpretation
15 and application of statutory protections and the balancing of the Plaintiffs' constitutional and
16 statutory interests with the Defendants' reasons for restricting and denying telephone access,
17 including an evaluation of alternatives to the current system.

18 **IV. MOTIONS**

19 There are no pending motions at this time. The Parties expect to file motions for summary
20 judgment, as well as other motions, including discovery motions, as necessary.

21 **V. AMENDMENT OF PLEADINGS**

22 Plaintiffs anticipate amending the pleadings to substitute some of the named Plaintiffs in
23 this action. Plaintiffs do not intend to amend the pleadings to assert additional causes of action or
24 add any new defendants.

25 **VI. EVIDENCE PRESERVATION**

26 The Parties certify that they have reviewed the Guidelines Relating to the Discovery of
27 Electronically Stored Information and confirm that the Parties have met and conferred pursuant to
28

1 Federal Rule of Civil Procedure 26(f) regarding reasonable and proportionate steps taken to
2 preserve evidence relevant to the issues reasonably evident in this action.

3 **VII. DISCLOSURES**

4 The Parties exchanged their initial disclosures under Federal Rule of Civil Procedure
5 26(a) on April 3, 2014.

6 **VIII. DISCOVERY**

7 In addition to their initial disclosures and confidential informal discovery solely related to
8 settlement discussions, the Parties continue to conduct discovery in this action. Pursuant to Rule
9 26(f) of the Federal Rules of Civil Procedure, the Parties submit the following discovery plan.

10 a. At this time, the Parties do not foresee the need to change the timing, form, or
11 requirement for disclosures under Rule 26(a) of the Federal Rules of Civil Procedure.

12 b. Plaintiffs have sought and will continue to seek discovery that focuses on, among
13 other things, matters regarding Defendants' policies and practices regarding Plaintiffs' telephone
14 access, including but not limited to (i) the effects of those policies and practices on the ability of
15 Plaintiffs to retain and consult with counsel, (ii) the effects of those policies and practices on the
16 ability of Plaintiffs to obtain evidence and present evidence in connection with their removal
17 proceedings; (iii) the effects of those policies on the ability of Plaintiffs to obtain documents,
18 information and visas from government agencies and others in connection with efforts to obtain
19 relief from removal; (iv) the negotiation, monitoring and enforcement of the contracts pursuant to
20 which Plaintiffs are held in ICE custody, (v) the promulgation and enforcement of the
21 Defendants' Detention Standards; (vi) whether the policies and practices denying and restricting
22 telephone access to Plaintiffs conform to Defendants' Detention Standards or the contracts
23 pursuant to which Plaintiffs and the proposed class are held in ICE custody; (vii) the rationale and
24 alleged justification for Defendants' telephone access policies and practices; (viii) alternatives to
25 Defendants' policies and practices sufficient to remedy the alleged violations of Plaintiffs'
26 statutory and constitutional rights. Plaintiffs do not believe that discovery should be conducted in
27 phases or be limited to or focused on particular issues.
28

1 c. Defendants have sought and anticipate continuing to seek discovery related, but
2 not limited, to the following: (i) the named Plaintiffs' continued ability to represent the class; (ii)
3 the named Plaintiffs' requests, both formal and informal, to access a telephone while held in
4 immigration detention; (iii) any complaints or grievances asserted by the named Plaintiffs to any
5 immigration officers or the detention facilities while in immigration detention regarding
6 Defendants' policies and practices related to telephone access; (iv) any differences in experiences
7 amongst the named Plaintiffs between the three facilities regarding telephone access; (v) any
8 actual harm suffered by the Plaintiffs caused by Defendants' policies and/or practices related to
9 telephone access, including any allegations that any policies and/or practices precluded and/or
10 interfered with Plaintiffs' attempts to secure counsel and/or defend themselves against charges of
11 removal; (vi) any alternative means for immigration detainees to place legal phone calls other
12 than those means ordinarily provided to the general prison population or for non-legal phone
13 calls; and (vii) any alternative means for immigration detainees to communicate with counsel
14 and/or persons necessary to prepare a defense to charges of removal other than the telephone
15 system available to the general population at each of the three facilities.

16 d. The Parties do not anticipate any issues regarding electronically stored information
17 in this action. Should e-discovery become an issue, the Parties will work on a mutually agreeable
18 plan regarding the form in which electronically stored data should be produced, and only involve
19 the Court as a last resort. The Parties have considered entering into a stipulated e-discovery
20 order, but have decided that such an order is unnecessary.

21 e. The Parties filed and the court signed a stipulated protective order to govern the
22 production of documents on January 13, 2015. *See* ECF No. 67.

23 f. At this time, the Parties do not believe any changes to the limitations on discovery
24 imposed by the Federal Rules of Civil Procedure or by local rule will be necessary, and reserve
25 the right to request them in the future, if necessary.

26 g. The Parties propose amending the schedule for discovery set forth in the Court's
27 July 11, 2014 Case Management and Pretrial Order for Bench Trial (*see* ECF No. 47). The
28

1 parties have been engaged in settlement discussions, and had agreed to a temporary stay of
2 discovery in this matter during part of those discussions. As a result of that temporary stay, the
3 parties seek additional time to complete necessary discovery in this action and have agreed to
4 propose the revised case schedule set forth in Section XVII *infra*.

5 h. The requested timing of the disclosure of expert witnesses and information
6 required by Rule 26(a)(2)(D) is discussed in Section XVII *infra*.

7 **IX. CLASS ACTIONS**

8 The Court certified a class of “all current and future immigration detainees who are or will
9 be held by ICE in Contra Costa, Sacramento, and Yuba Counties.” *See* ECF No. 31.

10 **X. RELATED CASES**

11 There are no related cases or proceedings pending before this Court or any other court or
12 administrative body.

13 **XI. RELIEF**

14 Plaintiffs seek declaratory relief, injunctive relief, and attorney’s fees and costs.

15 **XII. SETTLEMENT AND ADR**

16 Magistrate Judge Ryu has presided over ongoing settlement communications in this
17 matter. The Parties attended several settlement conferences, including conferences at the three
18 jails where class members are housed, participated in telephonic settlement conferences, and
19 exchanged written settlement proposals from June to October, 2014. *See* ECF Nos. 43, 50, 52,
20 55, 58, 59. Defendants plan to submit a written statement of their settlement position to Plaintiffs
21 on February 9, 2015. *See* ECF No. 61.

22 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

23 The Parties do not consent to have a magistrate judge conduct all further proceedings,
24 including trial and entry of judgment.

25 **XIV. OTHER REFERENCES**

26 The Parties agree that this case is not suitable for reference to binding arbitration, a special
27 master, or the Judicial Panel on Multidistrict Litigation.
28

XV. NARROWING OF ISSUES

It is still premature to determine whether any issue can be narrowed. The Parties are willing to meet and confer again to ascertain whether issues can be narrowed by agreement, after discovery has been completed.

XVI. EXPEDITED SCHEDULE

The Parties agree that this case is not suitable for expedited trial pursuant to the Expedited Trial Procedure of General Order No. 64.

XVII. SCHEDULING

For the reasons set forth in Section VIII.g. *supra*, the Parties propose the following amended schedule for discovery, designation of experts, motions, pretrial conference, and trial. This is the parties' first request for an amendment to the schedule set forth in the Court's Case Management and Pretrial Order for Bench Trial (ECF No. 47).

	Current Schedule	Proposed Schedule
Initial Disclosures	April 3, 2014	April 3, 2014
Fact Discovery Cutoff	May 14, 2015	July 14, 2015
Expert Disclosure and Exchange of Opening Reports	May 28, 2015	July 28, 2015
Rebuttal Expert Disclosure and Exchange of Rebuttal Expert Reports	June 18, 2015	August 18, 2015
Expert Discovery Cutoff	July 9, 2015	September 9, 2015
Last Day to Hear Dispositive Motions	August 27, 2015	October 29, 2015
Last Day to File and Serve Joint Pretrial Statement	October 6, 2015	December 15, 2015
Final Pretrial Conference	October 27, 2015	January 5, 2016
Trial Date	November 16, 2015 ³	January 25, 2016

³ Defendants note that trial days no. 5-8 (Nov. 23-25, 27) are currently scheduled to occur the week of Thanksgiving. Because Defendants' counsel work and reside in Washington, D.C., Defendants respectfully request that – if the Court does not amend the case management schedule as the parties request – the Court please consider rescheduling trial days no. 5-8 (Nov. 23-25, 27).

1 **XVIII. TRIAL**

2 Plaintiffs estimate that the Court trial of this matter will last 10-14 days. Defendants
3 believe that – if this matter cannot be settled between the parties – this case will be ripe for
4 decision on motions for summary judgment, rendering trial unnecessary. Plaintiffs do not agree
5 that the asserted claims can be resolved on summary judgment.

6 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

7 Neither party is currently aware of any interested non-party to this case.

8 **XX. OTHER MATTERS**

9 The Parties are not aware of any other matters that may facilitate the just, speedy, and
10 inexpensive disposition of this matter.

1 Dated: February 5, 2015

ORRICK, HERRINGTON & SUTCLIFFE LLP

2
3 By: /s/ Robert P. Varian
4 ROBERT P. VARIAN (SBN 107459)
5 DAVID KEENAN (WA Bar No 41359 (*pro*
6 *hac vice*))
7 CHRISTINE M. SMITH (SBN 267929)
8 JUDY S. KWAN (SBN 273930)
9 ALEXIS YEE-GARCIA (SBN 277204)
10 MATTHEW R. KUGIZAKI (SBN 286795)
11 JAYA KASIBHATLA (NY Bar No.
12 5208087 (*pro hac vice*))

9 Dated: February 5, 2015

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN
CALIFORNIA

11
12 By: /s/ Julia Harumi Mass
13 JULIA HARUMI MASS (SBN 189649)
14 MICHAEL T. RISHER (SBN 191627)
15 39 Drumm Street
16 San Francisco, CA 94111
17 Telephone: (415) 621-2493
18 Facsimile: (415) 255-8437
19 Email: jmass@aclunc.org

AMERICAN CIVIL LIBERTIES UNION
NATIONAL PRISON PROJECT

19 By: /s/ Carl Takei
20 CARL TAKEI (SBN 256229)
21 915 15th Street N.W., 7th Floor
22 Washington, DC 20005
23 Telephone: (202) 393-4930
24 Facsimile: (202) 393-4931
25 Email: ctakei@aclu.org

Attorneys For Plaintiffs

1 Dated: February 5, 2015

DISTRICT COURT SECTION
OFFICE OF IMMIGRATION LITIGATION
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE

4 JOYCE R. BRANDA
Acting Assistant Attorney General

6 WILLIAM C. PEACHEY
Director

8 ELIZABETH J. STEVENS
Assistant Director

10 By: /s/ Jennifer A. Bowen
JENNIFER A. BOWEN
KATHERINE J. SHINNERS
KATHERINE A. SMITH
Trial Attorney
P.O Box 868, Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 616-3558
Facsimile: (202) 305-7000
Email: jennifer.bowen@usdoj.gov

16 *Attorneys For Defendants*